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Letter dated 20 February 2017 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General of the United Nations

On instructions from my Government, I have the honour to write to you regarding General Assembly resolution 71/248 of 21 December 2016 concerning the establishment of a so-called International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. The resolution was adopted without consensus and is inconsistent with the provisions of the Charter. I also wish to address the report of the Secretary-General concerning implementation of that resolution (A/71/755).

First and foremost, the Government of the Syrian Arab Republic wishes to make it clear that the present letter, and any other comments that it may make regarding the substance of the resolution and the report in question, cannot in any sense be taken to mean that it accepts them or is prepared to discuss or negotiate on them. The report and the resolution are at heart a violation of the Charter and a departure from its principles.

I should like to set out the most prominent (but by no means the only) grave flaws in the resolution and the report, in addition to the risks and the political and legal repercussions that will necessarily ensue from the dubious insistence on establishing such "mechanisms" pursuant to the resolution.

Legal violations contained in the resolution and the report

– General Assembly resolution 71/248 and the report of the Secretary-General (A/71/755) constitute a grave and dangerous violation of Article 12 of the Charter, which states as follows: "While the Security Council is exercising in respect of a dispute or situation the functions assigned to it in the Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests". In the case of Syria, the Security Council is still exercising its full responsibilities and

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mandate. Consequently, the General Assembly has no prerogative or mandate to take any measure regarding this issue.

- The General Assembly does not fundamentally have the power to establish such mechanisms; under the provisions and principles of the Charter, that prerogative belongs solely to the Security Council. The resolution therefore sets a dangerous legal precedent: it violates the Charter and endorses a practice that deviates from the working methods of the United Nations. Since its foundation, the General Assembly had never established such a mechanism in any of its resolutions. The General Assembly can, in some cases, request the Secretary-General to negotiate on certain specific issues with the relevant Member State. However, the prior consent of the Member State remains a key element in such situations. The resolution was clearly adopted without the consent of the Syrian Arab Republic. Moreover, it was drafted despite the Government's objections, which the latter made clear through its "no" vote and its explanatory letters and statements before adoption.

- The resolution therefore constitutes a flagrant violation of Article 2 of the Charter. It was negotiated and adopted, and subsequently formed the basis of a report of the Secretary-General, without the explicit consent of the Syrian Arab Republic and without reference to a Security Council resolution adopted under Chapter VII of the Charter. That situation seriously undermines the principle of sovereign equality among all Members of the Organization and the principle of non-interference in their internal affairs, both of which are enshrined in Article 2 of the Charter.

- In the text of the resolution, the General Assembly has either neglected or deliberately ignored the fundamental principle of the consent of the concerned State. That does not, however, in any sense mean that the principle has been abolished, something that would set a dangerous precedent. The principle has been applied in the long-term practice of the United Nations, which has enabled the Organization to continue fully exercising its powers. Such legal attributes are also absent from the report.

- In its first report on implementation of the resolution, the Secretariat ought to have made it clear that, if the General Assembly wished to establish such a mechanism, it should have received an instruction to that effect from the Secretary-General. That, in turn, would have required the approval of the Government of the concerned State. Owing to that intrinsically perilous approach, the resolution and the report lack any legal foundation.

- The establishment of such a body is an illegal intervention that strikes at the heart of the sovereignty and internal affairs of a Member State. It amounts to a serious attempt to undermine the jurisdiction and legal procedures of its national agencies and authorities. The resolution and the report alike state that primary jurisdiction rests with the national courts and authorities of the Syrian Arab Republic. However, the remainder of both texts indicates a prior intention to undermine and violate national jurisdiction. The resolution and the report grant the so-called mechanism discretionary powers that are not subject to any clear standards in choosing the courts and authorities with which it wishes to cooperate. As one example among others, we wish to note that paragraph 21 of the report entitles the so-called mechanism to prevent certain States from accessing the information it possesses, on the grounds that its understanding or assessment is that those States have failed to respect international human rights law and standards.

- The resolution is fundamentally based on concepts that are deviant, dangerous and do not enjoy consensus in the context of the Organization's work. These

include the responsibility to protect, hypothetical non-national jurisdictions, and the idea of regional, national or other courts that may have jurisdiction in the future. Those terms and concepts have been rejected by most Member States, and they are the subject of an essential disagreement in the work of the United Nations. They are not mentioned in the Charter; indeed, they contradict the principles of State sovereignty and non-intervention in the internal affairs of States.

- The basic issue is that the work of the United Nations cannot rely on the so-called mechanism's endorsement of hypothetical jurisdictions that may emerge in the future. That concept is inconsistent with the purposes and principles of the Organization. It will lead inevitably to strained international relations, and it will impair the principles of cooperation, equality and the consolidation of peace and security that prevail in international relations.

- The resolution and the report are based on language that continues to elicit debate and deep disagreements in the United Nations. Their effect will be to drive a wedge between Member States and to entangle them in dangerous legal precedents, which the Governments of Member States will use as a basis to legitimize their interventions in the internal affairs of other States.

- The resolution grants the so-called mechanism a wide range of powers that are the prerogative of the national public prosecutor as a judicial organ. The Charter fundamentally does not give the General Assembly any mandates or prerogatives connected with judicial prosecution, or criminal investigations, or support for such investigations. This legal basis does not entitle the General Assembly to create an organ enjoying powers that fundamentally do not belong to it. Indeed, the General Assembly has no fundamental right to create such an organ. The General Assembly should refer back to the Charter in order to verify exactly which powers are granted to it under Articles 10 to 12 and 22.

- The grave legal violations that mar General Assembly resolution 71/248 are not the end of the matter. In the report, the Secretariat expands the powers of the so-called mechanism without any justification or legal argument. That step has exacerbated the legal violations and further complicated the situation. In paragraphs 31 and 32, the authors of the report set in stone the powers of the so-called mechanism, powers that are fundamentally the prerogative of the national public prosecutors of the concerned State.

- The most serious breach is that the Secretariat has, without any legal justification, introduced new powers that are not mentioned in General Assembly resolution 71/248. For instance, the report states that the mechanism can establish the connection between crime-based evidence and the persons responsible, focusing in particular on mens rea and to specific modes of criminal liability. Similarly, paragraphs 13 to 19 of the report empower the so-called mechanism to carry out a preliminary assessment of the evidence and prepare files focusing on the criminal conduct of the persons responsible, without any regard for their positions, titles or immunity.

- The resolution and the report are marred by grave legal violations, and they contravene the principles and provisions of the Charter. It follows that:

  - Contrary to what is stated in paragraph 38 of the report, the so-called mechanism cannot be considered a subsidiary body of the General Assembly;

  - The so-called mechanism cannot be deemed to have legal personality;

- Contrary to what is stated in paragraph 38 of the report, it cannot enjoy the privileges and immunities set forth in the Convention on the Privileges and Immunities of the United Nations;
- It cannot have the capacity to conclude agreements with any Member State or other entity as stated in paragraphs 18 and 37 of the report;
- No decision can be taken regarding the appointment of a head or deputy head of the so-called mechanism, and it cannot be given a secretariat;
- The United Nations cannot accept offers of contributions or the allocation of budgetary funds towards the establishment or operation of such a "mechanism". The reason is that the resolution, the report and the establishment of the so-called mechanism all amount to a violation of the Charter and a contravention of the principles set out therein;
- Any information or evidence collected, consolidated, preserved and analysed by the so-called mechanism therefore would not be admissible for use in any possible future criminal proceedings;

Impact and serious political consequences of the establishment of the so-called mechanism

- The establishment of the mechanism at this crucial stage of the Syrian crisis undermines the national reconciliation procedures undertaken by the Syrian Government in cooperation with the Governments of friendly States. Those procedures have been adopted and endorsed by large segments of the Syrian people and have proved successful in numerous regions.
- More importantly, the establishment of such a mechanism poses a direct threat to the prospects for a political solution in Syria which, as all of the relevant Security Council resolutions have emphasized, should be Syrian-led. The Secretariat ought to have taken into consideration the fact that, from the very outset, the non-consensual General Assembly resolution reflected the prior intent of the Governments of certain sponsor States to politicize such a "mechanism" and make it an instrument of political retribution, use it as a means to prolong the conflict in Syria, and continue to inflame the threat of terrorism to the region and the world and, hence, to endanger international peace and security.
- Bizarrely, the resolution and the report of the Secretary-General both state that this dubious mechanism is to be funded through voluntary contributions. That fact dispels any claims or illusions regarding the mechanism's independence and impartiality. Experience at the United Nations has shown the Governments of the States that fund such mechanisms and committees are the ones that predetermine their working methods, outlook and findings. And the parties behind this resolution and so-called mechanism are the Governments of States that sponsor, fund and direct terrorism in Syria, foremost among them Saudi Arabia, Qatar, Turkey and the Governments of certain well-known western States.
- The Syrian people have suffered enough tragedy and pain from the deviant and dangerous policies of the Governments of certain United Nations Member States which, to this day, continue supporting, funding, arming and directing extremist terrorist groups in the Syrian Arab Republic, all the while indulging and turning a blind eye to the travel and infiltration of thousands of foreign terrorist fighters into Syria. Thousands of those fighters then try to return to their countries of origin or residence in order to extend the reach of their savage acts of terrorism across the world.

– The Syrian people have suffered enough because the Governments of certain Member States believed, over the last few years, that they could use political and financial pressure or polarization within the United Nations with a view to deploying the organs, agencies and resolutions of the Organization as an instrument of political pressure and blackmail, the better to legitimize their brazen interference in the affairs of States that did not agree with their policies and outlook. Those realities, along with terrorism, pose a direct threat to the prosperity, coexistence, security and stability of peoples and the territorial integrity and independence of States.

Lastly, the Government of the Syrian Arab Republic reiterates that it rejects General Assembly resolution 71/248, which is non-consensual and unlawful, and the relevant report of the Secretariat (A/71/755). It also refuses to cooperate with the so-called mechanism or to recognize that it has any mandate or jurisdiction. It calls on Member States of the United Nations to take a similar stance by refusing to recognize or cooperate with any so-called mechanism that may be established under this non-consensual General Assembly resolution. Because the so-called mechanism was established by a General Assembly resolution that contravenes the provisions of the Charter, any action taken to fund it should be considered null and void. It would be unacceptable for the so-called mechanism to be granted any financial resources from the United Nations budget, or indeed any extrabudgetary resources. These would merely be used to achieve the political ends of the contributing States without any oversight on the part of Member States.

The Government of the Syrian Arab Republic calls on the Secretary-General of the United Nations to review the report in the light of the grave legal violations and the dangerous legal political repercussions that have been demonstrated and explained in the present letter. It urges him to use his powers to put a decisive and final end to the deviant practice that is the so-called mechanism.

I should be grateful if you would have the present letter issued as a document of the General Assembly under agenda item 31.

(*Signed*) Mounzer **Mounzer**
Chargé d'affaires a.i.
Minister Counsellor